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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 830.

THE SEMINOLE NATION, *Petitioner*,

v.

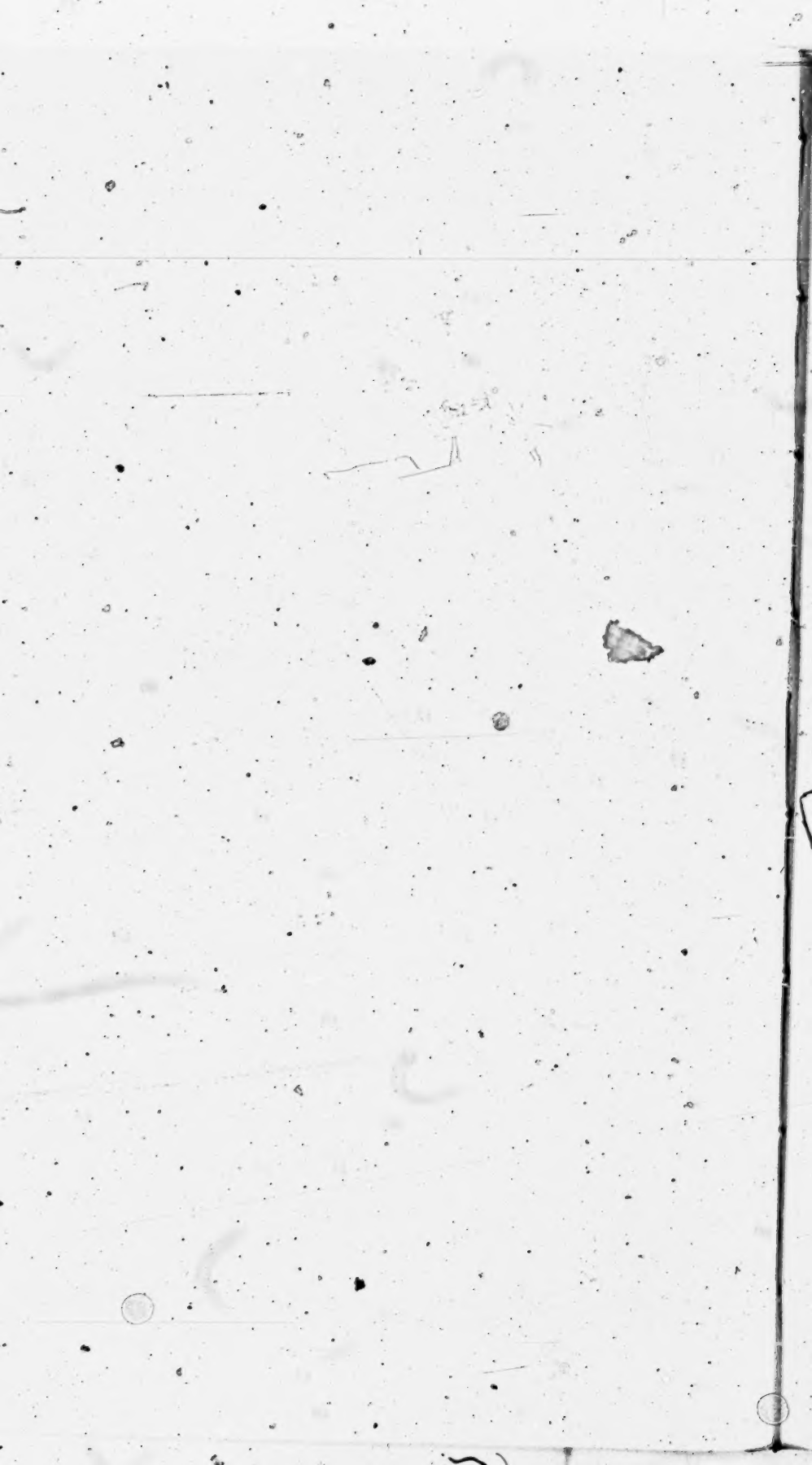
THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

BRIEF OF PETITIONER.

PAUL M. NIEBELL,
C. MAURICE WEIDEMEYER,
W. W. PRYOR,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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v.

THE UNITED STATES, *Respondent.*

On Writ of Certiorari to the Court of Claims.

BRIEF OF PETITIONER.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Seminole Nation of Indians, the petitioner herein, respectfully presents the following data for the consideration of the Court upon the review of this case:

Opinion Below.

The opinion of the Court of Claims is not yet reported (R. 6-9).

Jurisdiction.

The judgment of the Court of Claims was entered on May 5, 1941 (R. 9). Motion for a new trial was overruled on October 6, 1941 (R. 10). The petition for a writ of certiorari was filed December 31, 1941, and was granted, February 16, 1942 (R. 36). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 299, 43 Stat. 936, 939 (Section 288 of the Judicial Code as amended, 28 U. S. C. A. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statutes Involved.

The special jurisdictional act, approved May 20, 1924, c. 162, 43 Stat. 133, provides in part as follows:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."
>
> * * * * * * * * *
>
> "Sec. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation * * *"

The Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provides in part as follows:

> "The Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all *sums* expended gratuitously by the United States for the benefit of said tribe or band; * * *"

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides in part as follows:

> "That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Act * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original jurisdictional Acts, as amended * * *."

The Act of May 22, 1939, c. 140, 53 Stat. 752, provides as follows:

> "In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect as if the cause had been brought here by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.
>
> "The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.
>
> "In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of

substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

Questions Presented.

The questions presented are as follows:

1. Whether the Seminole Nation is entitled to recover just compensation for 10,351.82 acres of its lands, held by it in fee simple, which were inadvertently excluded from its domain by an erroneous survey made by an officer of the United States and subsequently patented by the administrative officers of respondent to white settlers and other Indians—which patents were confirmed by the failure of the United States to cancel them after a full knowledge of said errors.

In other words, whether the rule established in *United States* v. *Creek Nation*, 295 U. S. 103, is applicable to this case.

2. Whether fee simple title to the 200,000 acres of land, described in the Treaty of March 21, 1866, passed by grant *in praesenti* to the Seminoles, by the terms of said Treaty of March 21, 1866, 14 Stat. 755.

3. Whether an erroneous survey would divest the Seminole Nation of title to its lands granted in fee simple by said Treaty of March 21, 1866.

4. Whether the Court of Claims is required to make findings of fact on pertinent and material issues of fact.

(a) Whether in the findings of the lower court the recital of an allegation in the pleadings on a material issue of fact complies with the requirement that the lower court make findings of fact.

(b) Whether the statement in the Court of Claims Findings of Fact that "It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54

acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others," is or can be considered as a proper finding of fact on the material issues of (1) the amount of the acreage erroneously excluded by the survey; (2) how the plaintiff became dispossessed; (3) the manner in which plaintiff's lands were taken; (4) by whom plaintiff's lands were taken; (5) the date of the taking; and (6) by what method plaintiff's lands were granted to others.

5. Whether an item of a purported gratuity offset, which the Court of Claims has allowed the United States in one case, can later be used another time and in a subsequent case to defeat the claim of petitioner in the subsequent case. In other words, is the United States entitled to have more than one allowance for the same item of gratuity offset?

6. Whether the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, which authorizes the Court of Claims to consider and offset "*sums* expended gratuitously by the United States for the *benefit*" of an Indian tribe, permits the court to use lands rather than "*sums*" as a gratuity offset.

Statement of the Case.

The material facts of this case are set forth as follows: By the terms of the Treaty of March 21, 1866, 14 Stat. 755, the United States granted to the Seminole Nation a national domain of 200,000 acres of land. Art. III of said Treaty provides in part as follows:

> "The United States having obtained by grant of the Creek Nation the westerly half of their lands, *hereby grant to the Seminole Nation* the portion thereof hereafter described, which shall constitute the national domain of the Seminole Indians. Said lands so granted by the United States to the Seminole Nation are bounded and described as follows, to-wit: Beginning on the Canadian River where the line dividing the Creek lands

according to the terms of their sale to the United States by their treaty of February 6, 1866 (June 14, 1866), following said line due north to where said line crosses the north fork of the Canadian River; thence up said north fork of the Canadian River a distance sufficient to make two hundred thousand acres by running due south to the Canadian River; thence down said Canadian River to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole Nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of One Hundred Thousand ($100,000) Dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written." (Italics ours.)

The Creek "dividing line" under the Creek Treaty of June 14, 1866, 14 Stat. 785, was established by Frederick W. Bardwell in 1871, and was approved by the Secretary of the Interior on February 5, 1872. This Bardwell line became the east boundary of the new Seminole National domain granted to the Seminole Nation by the United States under said Seminole Treaty of March 21, 1866, and constituted the base from which the true west line of the Seminole 200,000 acre treaty tract was to have been established (R. 7).

By Treaty of February 27, 1867, 15 Stat. 531, between the Pottawatomie Indians and the United States, said Pottawatomies were authorized to select a suitable location for the exclusive use and occupancy of said tribe in Indian Territory, said location to be made "without interfering with the locations made for other Indians."[1] Accordingly

[1] In its Finding 4 the lower court stated that the Pottawatomies were "granted" lands immediately west of the Seminole Domain. Let us point out to the Court that no "grant" was made to the Pottawatomie tribe. The Pottawatomie Treaty of February 27, 1867, 15 Stat. 531 (Art. I) contains no such grant, but merely authorizes the Pottawatomie Indians to locate in Indian Territory, and

"To select, if possible, a suitable location for their people without interfering with the locations made for other Indians."

said Pottawatomie Indians selected lands immediately west of and adjoining said Seminole National Domain.

In 1871, and within two months after the survey and running of the Creek "dividing line" by Frederick W. Bardwell, the respondent employed one Nathaniel Robbins to run the western boundary line of this 200,000 acre tract which the respondent had granted to the Seminole Nation under the said Treaty of March 21, 1866, 14 Stat. 755. This survey was completed in 1871 and was approved by the Secretary of the Interior on February 5, 1872. According to *Robbins' calculations* the number of acres included between the Canadian River on the south, the north fork of the Canadian River on the north, the Bardwell line on the east and the Robbins line on the west, was 200,000.03 (R. 7).

As it later developed, said Robbins survey and his calculations based thereon, were grossly in error (R. 12-14), and the said 200,000-acre tract contained 189,648.18 acres only (R. 16), and as a result of said errors 10,351.82 acres of the Seminole National domain, granted to the Seminole Nation by said treaty of March 21, 1866, were erroneously and inadvertently included in the Pottawatomie reservation, located immediately west of said Seminole domain.

By an agreement ratified in the act of March 3, 1891, c. 543, 26 Stat. 989, 1016, 1017, 1026, the Pottawatomies ceded to the United States the tract assigned to them under their treaty of February 27, 1867. In the agreement the United States stipulated that all allotments in severalty made or to be made to Pottawatomie Indians from lands within the cession, shall be completed and confirmed; and that it would

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In the letter of Acting Commissioner of Indian Affairs to the Secretary of the Interior dated May 17, 1887 (Sen. Ex. Doc. No. 64, 51st Cong., 2nd Sess., p. 3) it is stated:

> "March 16, 1872, the Secretary of the Interior decided that the land selected by the Pottawatomies under the treaty of 1867 could not be conveyed by Patent to the Nation, for the reason that as all the members of the tribe had become citizens the nation had become extinct."

make other allotments in severalty to the Pottawatomie Indians out of the lands within their cession; and the ratifying act required that these allotments be made and that the remaining lands be opened to settlement as public lands and sold to settlers at a stated price per acre, which was to be turned into the treasury as public money.

In carrying that act into effect the Indian and land bureaus of the United States erroneously treated the strip of unceded Seminole lands as a part of the Pottawatomie cession, and accordingly allotted and patented said 10,351.82 acres of Seminole lands to Pottawatomie Indians, by way of fulfilling the Government's obligation to them; sold and patented other of said Seminole lands to white settlers; and turned the purchase price received from such sales into the United States Treasury as public money. Thereafter said Seminole lands have been held by the grantees adversely to the petitioner (R. 7, 16).

In 1881 the Seminole Nation acquired a tract of 175,000 acres of land east of and contiguous to the 200,000 acre treaty tract. The history of the acquisition of said 175,000 acre tract is hereinafter set forth. This tract, together with the 200,000 acres acquired by said Treaty of March 21, 1866, should have constituted a domain of 375,000 acres.

In 1897 and 1898 the combined Seminole domain was sectionalized by the United States Geological Survey and it then, for the first time, became apparent that the combined areas of the Seminole tracts were deficient to the extent of some 9,135.57 acres. On January 17, 1900, the Principal Chief of the Seminole Nation wrote to the Commissioner of Indian Affairs as follows (R. 19):

> "By an error made by the United States Surveyors in establishing the boundary of said tracts, there was, as a matter of fact, set apart to the Seminole Nation only 365,864.43 acres, leaving a deficit of 9,135.57 acres."

In said letter the Principal Chief also requested the Respondent to correct the error and give the Seminole Nation the lands to which it was entitled (R. 19).

On February 5, 1900, the Commissioner of Indian Affairs, in his communication to the Secretary of the Interior, reviewed the history of this matter and stated in part as follows (R. 20):

> "The recent surveys in the Indian Territory made by the Geological Survey show that the total area included in the Seminole Nation is 365,864.43 acres, as stated by Governor Brown."

The errors of Robbins in surveying and establishing the west boundary of the Seminole 200,000 acre tract was further recognized by the officials of the respondent. On October 16, 1900, Acting Secretary F. L. Campbell wrote to the Commission to the Five Civilized Tribes, and after reviewing the facts, stated in part as follows (R. 22):

> "'• • • but said surveys appear to indicate several hundred acres in excess of 175,000 acres, which shows that if error existed in the total area its cause will be found in the 'crooked west boundary' of the 200,000 acres west of the 'dividing line' or in the incorrect location of the 'dividing line' itself • • •."

Although as early as 1900 the respondent had knowledge or ample means of knowledge of these errors made by its administrative officers,[2] yet respondent took no steps to correct them and by its inaction it confirmed said erroneous disposals and patents, as of the date of their issuance. Therefore, we submit that the petitioner is now entitled to just compensation for the taking of said lands.

In the lower court the respondent, defendant below, took issue with us on the facts, contending that the area of the Seminole tracts was computed from an erroneous location of the Creek "dividing", or Bardwell line, and relied upon the Bardwell field note record, and certain distances set forth therein.

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[2] In 1900 the United States had before it all the records of these old surveys that were before the General Land Office when it prepared the memorandum May 21, 1930 (R. 35-36), and in 1900 the United States could have directed the field examination such as was made by the General Land Office in 1941 (R. 10-17).

The petitioner, plaintiff below, relied upon the location of the Bardwell line as identified, relocated on the ground and reestablished by H. C. F. Hackbusch, a surveyor of the General Land Office, in 1888 (R. 15). This position was sustained by the lower court in *Creek Nation* v. *United States*, 93 C. Cls. 561, in which the same question was before the court.

Let us digress for a moment and explain to the Court that before this case was originally filed attorneys for petitioner, plaintiff below, having been informed that the old surveys of the Seminole lands were in error, requested the General Land Office to review these surveys and determine which one of them was in error. As all of these old survey records were a part of the Interior Department files we believed that a determination of the matter by the Government's own engineers could be relied upon by both parties.

A memorandum dated May 21, 1930, was prepared by the General Land Office, from the field note records of these old surveys, and the conclusions are set forth therein as follows (R. 35-36):

"Memorandum dated May 21, 1930.

Seminole Tracts:

For the purpose of computing the area subdivided by the Geological Survey of the lands in the two portions constituting the Seminole Lands, the terminal corner of the Creek Dividing Line on the south or right bank of the North Fork of the Canadian River was used as a point of control, from which the Bardwell line as retraced by Hackbusch in 1888 was laid down to the north or left bank of the Canadian River. This covers a distance of 34 miles 37.70 chs., and from this division line as thus defined, it is found that west thereof, there were actually included in the 200,000-acre tract 188,449.46 a. or a deficiency of 11,550.54 a. East of said line there were actually included in the 175,000-acre tract 177,397.71 a., or an excess of 2,397.71 a., leaving a net deficiency in the two tracts of 9,152.83 a."

Accordingly the original petition was based upon the figures and conclusions set forth in this memorandum of the General Land Office.

As the case progressed a question was raised as to the official status of the memorandum, and the conclusions set forth therein were questioned, even though it was reviewed and its conclusions were confirmed by letter of the Acting Assistant Commissioner of the General Land Office to the Commissioner of Indian Affairs, dated January 12, 1931 (R. 26-35), and the Interior Department suggested that the "doubts can be cleared only by a thorough field examination" (R. 29).

Consequently, trial of the case was delayed in the lower Court to permit a thorough field examination on the ground, with the end in view of settling all disputes and controversies with respect to the facts. The Department of Justice, with the consent of petitioner's counsel, requested the General Land Office to make a field examination of the true location of the Creek "dividing" line, as established by Bardwell in 1871, and the lines of certain later surveys that were related thereto in connection with the controversy involved in this suit (R. 10-11).

This investigation was made under the direction of Mr. Arthur D. Kidder, District Cadastral Engineer of the General Land Office.[3] This investigation confirmed the original memorandum of the General Land Office of May 21, 1930, except that the 1888 Hackbusch retracement, as located on the ground, varied slightly from the field note record on

[3] Mr. Kidder has had some forty years experience in this field of engineering work, and was Commissioner of this Court to settle boundary disputes in *Oklahoma* v. *Texas*, 272 U. S. 21, 273 U. S. 93, and *New Mexico* v. *Colorado*, 267 U. S. 30, 268 U. S. 108. Both parties were indeed fortunate to have had the benefit of the wide experience of Mr. Kidder in straightening out these old surveys of the Seminole lands. Strange to say, however, after the Kidder report was submitted to the General Land Office, although the Government requested this field examination, its counsel refused to file it as evidence in the case, and it became the duty of petitioner to do so.

which the original memorandum was based, and this slight variation had the effect of reducing the deficiency in the area of the Seminole 200,000-acre treaty tract from 11,550.54 acres, as originally claimed, to 10,351.82 acres. Thereafter, petitioner adopted the findings of the field examination and reduced its demand to 10,351.82 acres in the lower court, and has confined its demand to that acreage in this Court.

The report of Mr. Kidder, dated March 8, 1941, shows conclusively that the Robbins survey of the west boundary of the Seminole 200,000 acre treaty tract and his computation of the area were in error. In discussing this survey, Mr. Kidder states (R. 12):

> "It appears very evident, after a thorough field examination, that Robbins began his survey at a point that was not in agreement with the dividing line, and that the area which is actually included within the tract boundaries is much less than 200,000 acres.
>
> "There are several factors that contribute to the discrepancy in area: (1) The beginning point was east of the dividing line; (2) The Robbins meander courses are not correct as to their direction from true north; and (3) the length of the Bardwell east boundary, from north to south, is very much less than the distance that is given in the field notes."

Kidder further states (R. 14):

> "The actual length of the west boundary of the 200,000 acre tract, between the rivers, as taken from the township plats, is 28.86 chains (1905 feet) *greater* than the Robbins field note record distance.
>
> "As a consequence of the above known discrepancies it is impracticable to adjust the Robbins lines to secure a closure for the computation of the enclosed area. The showing is made that the tract contains 200,000 acres, but the calculation cannot be verified. It is necessary to abandon the Robbins record and take the directions and lengths of lines as these are found on the ground;"

The report also sets forth a full account of the survey of the retracement of the Creek "dividing" line, or Bardwell line, made in 1888 by H. C. F. Hackbusch, a surveyor of

the General Land Office, and sets forth the fact that Hackbusch found some of the old corners set by Bardwell on the ground, and ran a line retracing the Bardwell line, through these identified corners (R. 14-16). The area in the Seminole 200,000 acre tract betwen the Bardwell line as retraced by Hackbusch, and the Robbins west line, and the north and south Canadian Rivers, was 189,648.18 acres, or 10,351.82 acres short of the 200,000 acres granted to the Seminoles by the Treaty of March 21, 1866 (R. 16).

Even though the lower court had this evidence before it yet it failed to make a definite finding as to the Seminole acreage erroneously excluded from the Seminole 200,000 acre tract by the Robbins survey, and included in the Pottawatomie Reservation.

In its Finding 4 the lower court said (R. 7):

> "It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54 acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others."

The lower court failed to find as a material fact that there was an actual deficit of 10,351.82 acres in said tract, as shown by the Kidder report. This seemed strange to us in view of the holding of the lower court in *The Creek Nation* v. *United States*, 93 C. Cls. 561 (decided on the same day the case at bar was decided), settling this identical question that the *true Bardwell line location* was that which was reestablished by Hackbusch in 1888, and that the Hackbusch retracement line was the point from which to make the computation of the acreage in that case.

Specification of Errors to be Urged.

The lower court erred:

1. In failing and refusing to allow just compensation to petitioner under the rule established in *United States* v. *Creek Nation*, 295 U. S. 103, for 10,351.82 acres of its lands,

owned by petitioner in fee simple and taken from it by patents inadvertently issued thereon pursuant to the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026, which patents were confirmed by the United States through its failure to place the Seminole Nation in possession of said lands after a full knowledge of the facts.

2. In failing to find and hold that the petitioner was divested of its fee simple title to 10,351.82 acres, which were part of a definitely described 200,000-acre tract, acquired by grant *in praesenti* in the Treaty of March 21, 1866, when patents thereto were issued by respondent pursuant to the Act of March 3, 1891, c. 543, 26 Stat. 989, 1016-1017, 1026.

3. In failing to find from the evidence submitted the amount of acreage of petitioner's lands excluded by the erroneous Robbins survey of the west boundary of the Seminole 200,000-acre tract, and thereafter patented to white settlers and individual Pottawatomie Indians.

4. In finding and holding that the 175,000-acre tract purchased by the United States for the Seminoles by Act of August 5, 1882, c. 390, 22 Stat. 257, 265, to correct an error made by the United States in locating said Seminoles on the wrong land, would defeat the claim of the Seminole Nation for just compensation for 10,351.82 acres of Seminole lands granted to the Seminole Nation in fee simple by the Treaty of March 21, 1866, 14 Stat. 755.

5. In finding and holding that said 175,000-acre tract which respondent turned over to the Seminole Nation to protect them in their improvements, constituted an element of gratuity.

6. In failing to find definite values of the respective elements of "gratuity" and "reparation" in connection with the 175,000-acre offset claim of respondent.

7. In holding that under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, it could use land as an offset, rather

than the actual "sums" expended for the land claimed by respondent as an offset.

8. In holding that under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, it had jurisdiction to offset land against land, without first definitely determining the amount due petitioner for its land taken by respondent, or the actual amount of the gratuity element in the land claimed by respondent as an offset.

9. In holding that, after having allowed respondent an offset for the 175,000 acre tract in case No. L-51, *The Seminole Nation* v. *United States*, 93 Ct. Clms. 500, 525, it could again and for a second time allow the respondent another offset, in this case, for the same tract of land.

Summary of Argument.

Our argument on the case in the main may be summarized as follows:

1. That under the rule established in *United States* v. *Creek Nation*, the Seminole Nation is entitled to just compensation for 10,351.82 acres taken by the United States from the Seminole Nation and patented to homesteaders and Pottawatomie Indians, which patents were confirmed by the failure of the United States to cancel them after a knowledge of the facts.

(a) That by Treaty of March 21, 1866, 14 Stat. 755, the Seminole Nation acquired by grant *in praesenti* the fee simple title to a definitely described area of 200,000 acres of lands for its national domain.

(b) That the erroneous survey of the west boundary of the Seminole domain, made by Robbins in 1871, did not divest the Seminole Nation of its title to said 10,351.82 acres thus erroneously excluded from the Seminole domain and included in the Pottawatomie reservation.

(c) That the erroneous and inadvertent issuance of patents to said Seminole lands, confirmed by the United

States through its failure to correct said errors after a knowledge of the facts, created the taking.

(d) That the Seminole Nation is entitled to just compensation for said 10,351.82 acres so taken; *i.e.*, the value of the lands as of the dates of said patents, and in addition thereto interest at 5 per cent per annum on said values to date of judgment.

2. That the lower court failed in its duty to make adequate findings on material issues of fact with respect to the affirmative claim of petitioner in that it failed to find the amount of acreage excluded from the Seminole domain and included in the Pottawatomie reservation by said erroneous Robbins survey.

With respect to the offset phase of this case, our argument may be summarized as follows:

1. That the 175,000-acre tract is an entirely different transaction, depending upon different considerations and circumstances, than the lands forming the subject matter of this suit, and therefore has no place in this or any other suit of the Seminole Nation, and forms no basis of a counter-claim or a gratuity offset against the Seminole Nation.

2. That the lower court erred in using this item to defeat the present claim of petitioner for just compensation for said 10,351.82 acres of Seminole domain, for the reasons that:

(a) This item was not an element of gratuity, but was merely an element of reparation to the Seminole Nation for an error made by the United States.

(b) That the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, permits the court to offset *sums* and not lands in kind, and the lower court has used the item in a manner not authorized, even if this item were properly chargeable to the Seminole Nation.

(c) That the lower court already has used this same item as a gratuity offset in case No. 348 in this court, and its right to do so has been challenged by this peti-

tioner in that case, and clearly the lower court cannot use this item a second time in this case to defeat this claim of the Seminole Nation, after it has once before been used as an offset in another Seminole case.

Argument.

With respect to the affirmative claim of petitioner we contend that the lower court erred in failing to award just compensation to the Seminole Nation for the 10,351.82 acres involved in this suit, under the rule laid down by this Court in *United States* v. *Creek Nation*, 295 U. S. 103.

The rule established in United States v. Creek Nation applies to this case.

The facts in this case are similar in all respects to those in *United States* v. *Creek Nation*, 295 U. S. 103, and we submit that the rule established in that case is equally applicable to the case at bar.

In this connection let us point out to the court the following similarities in these cases:

1. That the Seminole Nation owned its lands in fee simple; and the United States guaranteed them quiet possession of said lands.

2. That an erroneous survey excluding Seminole lands from the Seminole domain and including them in the lands of another tribe would not divest title from the Seminole Nation.

3. That the erroneous patents issued, when confirmed by the United States after a disclosure of the facts, would create a taking as of the dates of the issuance of said patents.

4. That the Seminole Nation is entitled to just compensation for the lands so taken.

The Seminole Nation, like the Creek Nation, had a fee simple title to its lands, not the usual Indian right of oc-

cupancy with the fee in the United States. That title was acquired and held under said Treaty of March 21, 1866, 14 Stat. 755 (quoted *supra* p. 5), and by Article 1 of this treaty it was provided that "the United States guarantee them quiet possession of their country."

The 10,351.82 acres of Seminole lands involved in this suit were a part of the 200,000-acre tract *granted in fee simple* to the Seminole Nation under said Treaty of March 21, 1866. The Seminole title, therefore, was founded upon this treaty. This treaty stated in part that "The United States * * * hereby grant to the Seminole Nation" the lands described therein. The words "hereby grant" denote a *grant in praesenti*. *United States* v. *Brooks*, 10 How. 442; *Leavenworth, etc., Railroad Co.* v. *United States*, 92 U. S. 733, 741; *Wright* v. *Roseberry*, 121 U. S. 488, 496. By virtue of this treaty the title of the Seminole Nation attached to said 10,351.82 acres, and until a cession of said lands by the Seminole Nation, or until there was an appropriation of said lands by the United States, the fee title remained in the Seminole Nation. See *New York Indians* v. *United States*, 170 U. S. 1.

It matters not that the boundaries of said Seminole 200,000-acre tract were surveyed, for the Seminole title did not depend upon the survey, but rested squarely upon the Seminole Treaty of March 21, 1866. As this court in *United States* v. *Carpenter*, 111 U. S. 347, 349, said:

> "It matters not whether the land had been surveyed or not; the treaty was notice that a part of the quarry would be retained by the Government, and that the whole might be for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the land department."

That the erroneous survey of the west boundary of this Seminole treaty tract, whereby said 10,351.82 acres of Seminole lands were excluded from the Seminole domain and included in the Pottawatomie reservation, would not be

an appropriation of these lands is well settled. This point was directly passed upon in *United States* v. *Creek Nation*, 295 U. S. 103, 111, wherein this court said:

> "Plainly the appropriation was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership, nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error."

Therefore, this erroneous Robbins survey of the west line of the Seminole domain, did not amount to an appropriation of these Seminole lands, and it was not intended to do so. It was through inadvertence that this error was made by the officer of respondent, and led to the further errors subsequently committed, which in themselves created the taking of these Seminole lands.

The Subsequent Disposals of Seminole Lands Created the Taking.

Because of the error in the survey of the west line of the 200,000-acre Seminole national domain, 10,351.82 acres thereof were erroneously included within the Pottawatomie tract as officially surveyed and platted, and thereafter were occupied by that tribe. The same is true of the Creek lands in the *Creek* case, in which Creek lands were thrown into the Sac and Fox reservation, and were thereafter occupied by that tribe.

By an agreement ratified in the Act of March 3, 1891 (Sec. 8, c. 543, 26 Stat. 989, 1016), the Pottawatomies ceded to the United States the tract assigned to them under their treaty of February 27, 1867, 15 Stat. 531. In the agreement the United States stipulated that all allotments in severalty made, or to be made, to the Pottawatomie Indians out of lands within their cession, under the Act of February 8, 1887, c. 119, 24 Stat. 388, shall be completed and confirmed; and the ratifying act required that after these allotments

were made the remaining lands were to be opened to settlement as public lands and sold by settlers at a stated price per acre, and the proceeds were to be turned into the treasury as public money.

Section 16 of said Act of March 3, 1891, provided in part as follows:

> "That whenever any of the lands acquired by either of the three foregoing agreements respecting lands in the Indian or Oklahoma Territory shall by operation of law or proclamation of the President of the United States be open to settlement they shall be disposed of to actual settlers only, under the provisions of the homestead and townsite laws * * *."

In 1896 and 1897, when the Seminole lands were sectionalized by the United States Geological Survey, the errors became apparent. In 1900 the Seminoles demanded the lands to which they were entitled (R. 19). However, the erroneous patents already issued were permitted to stand, and further erroneous patents were thereafter issued, and no steps were taken by the United States to correct said errors, or to place the Seminole Nation in possession of its lands.

Nor were any steps taken by respondent under the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, which provided in part as follows:

> "Sec. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the * * * Seminole tribe * * * for * * * recovery of any land claimed by any of said tribes * * *, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits. * * *"

As was said by this court in *United States* v. *Creek Nation*, 295 U. S. 103, 110:

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the disposals; but it was not in a position where it could be expected to assume that burden. It was in a state

of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly, the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. But, although having full knowledge of the facts, it made no effort in that direction. On the contrary, it permitted the disposals to stand—not improbably because of the unhappy situation in which the other course would leave the allottees and settlers. In this way the United States, in effect, confirmed the disposals; and it emphasized the confirmation by retaining, with such full knowledge, all the benefits it has received from them.

"We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe."

In adopting the Government's theory that the patents created the taking in the *Creek* case, this Court further stated, *Creek* case, *supra*, p. 111:

"But not so of the disposals under the act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip: but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals. It was through them that the lands were taken; so the compensation should be based on the value at that time * * *."

Therefore, this court has clearly held that the confirmation of the erroneous patents by the United States created the taking, which required the United States to make just compensation to the tribe for the lands so taken as of the dates of the patents.

The court further lays down the rule governing the just compensation to be paid to the tribe. In the *Creek* case, *supra*, pp. 111-112, this court said:

"But the just compensation to be awarded now should not be confined to the value of the lands at the time of the taking but should include such addition thereto as may be required to produce the present full equivalent of that value paid contemporaneously with the taking. Interest at a reasonable rate is a suitable measure by which to ascertain the amount to be added. The treaty of 1866, the act of 1889 and other statutes show that five per cent per annum is a reasonable rate as between the parties here."

Seminole treaties and statutes dealing with Seminole trust funds show that five per cent per annum was paid by the United States on Seminole moneys held in trust by it (Treaty of March 21, 1866, 14 Stat. 755; Act of March 2, 1889, c. 412, 25 Stat. 980, 1004; Seminole Agreement, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567).

Therefore, we submit that the case at bar is similar to the *Creek* case, and that the lower court should have applied the same principles of law in this *Seminole* case as was applied by this Court in the *Creek* case.

The Lower Court erred in injecting the Seminole 175,000-acre tract in this suit.

The sole reason for the failure of the lower court to apply the rule in the *Creek* case was that in view of the fact that the Seminole Nation had been given *another* tract of 175,000 acres of lands, it was not entitled to just compensation for said 10,351.82 acres as of the dates of the issuance of patents.

The lower court said (R. 8-9):

"Plainly it cannot recover. Although there may have been this deficit, more or less, in the 200,000 acre tract the defendant was obligated to set apart for plaintiff, the plaintiff was compensated therefor fifteenfold by the addition to the reservation of 175,000 or more additional acres immediately to the east. The plaintiff was entitled to receive from the defendant only 200,000 acres, but it has in fact received at least

360,000 acres and, therefore, cannot complain that there was a small deficit in the original 200,000 acre tract agreed to be set apart to it."

In this holding the lower court erred in three respects:

1. The acquisition of the 175,000 acre tract by the Seminole Nation did not involve an element of gratuity, but constituted an element of reparation for the Government's own error.

2. That the 175,000 acres cannot be offset as land under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, which permits *sums* only to be offset against an Indian tribe.

3. That the lower court has already offset the amount paid by the United States for this tract in *The Seminole Nation* v. *United States*, 93 Ct. Cls. 500, and it cannot properly use the same item again to defeat the present claim of petitioner.

Petitioner's claim, as heretofore set forth, was clear, definite and certain; but the lower court instead of determining the question of respondent's liability on petitioner's claim and then offsetting any "sums" which the respondent may have had, mixed up petitioner's claim with an alleged claim of respondent for a purported gratuity offset on another and distinct tract of land of 175,000 acres. The acquisition by the Seminole Nation of said 175,000 acre tract depended upon an entirely different consideration, and had a separate and distinct history.

In order that the court may see how petitioner's claim was confused with this transaction, the history of said 175,000 acre tract is set forth as follows:

By treaty of June 14, 1866, 14 Stat. 785, the Creek Nation ceded to the United States the west half of its entire domain, and retained the east half as its permanent national domain. Said lands were "to be divided by a line running north and south" (Article 3). By Treaty of March 21, 1866, 14 Stat. 755, the Seminole Nation purchased as its national domain

200,000 acres of the lands to be ceded by the Creeks, immediately west of the adjoining said Creek "dividing line."

In the fall of 1866—before the Creek "dividing line" was surveyed—the Seminoles were removed by the United States to what was believed to be their new 200,000-acre national domain granted to them in said Treaty of March 21, 1866, and respondent's officers encouraged them to settle down and make permanent improvements thereon as rapidly as possible. The officers of the Government assured them that they would be protected in their improvements (Finding 3, R. 7; Sen. Ex. Doc. No. 75, 47th Cong., 1 Sess., pp. 5, 7; Sen. Ex. Doc. No. 126, 51 Cong., 1 Sess., pp. 2, 3, 6, 9; R. 17-19).

When this treaty was executed the Seminoles were promised that their new domain would be surveyed in the fall of 1866, but this was not done (R. 17).

In 1868 the first attempt was made by the United States to survey the Creek "dividing line" which was also to be the eastern boundary of the Seminole 200,000-acre tract. Under direction of the Commissioner of Indian Affairs, one Rankin, in 1868, surveyed this line. The Seminoles were shown the Rankin line by defendant's officers, and were told that this was their eastern boundary, and those who were located east thereof were moved west of this line (R. 17).

However, the Creeks objected to this survey, claiming that said line had been run too far east. The Seminoles became alarmed at the prospect of being forced to move again, but were assured by respondent's officers that they would not be disturbed even if the Rankin survey were found to be erroneous, and that they would be protected in their improvements (R. 17-18; Sen. Ex. Doc. No. 126, 51st Cong., 1st Sess., p. 2).

The Rankin survey was found to be erroneous and was not approved, but no immediate steps were taken by respondent to correct this error or to establish the correct Creek "dividing line" (Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 5; R. 18).

Finally, in 1871, the Creek "dividing line" was resurveyed and established by Frederic W. Bardwell, and this survey was approved on February 5, 1872. This Bardwell line was placed 7 miles west of the Rankin line, and the large area between the two lines, then estimated at 175,000 acres, and occupied by the Seminoles, was thrown within the boundaries of the Creek Nation. Thus it was discovered that the Seminoles had, by error, been settled *in part* on lands of the Creek Nation. During the four-years interval between the Rankin and Bardwell surveys the Seminoles had occupied this area believing, and being assured by respondent's officers, that this was a part of their new national domain, and had built homes and made other extensive and valuable improvements on these lands (Sen. Ex. Doc. 126, 51st Cong., 1 Sess., p. 9), which at that time were more valuable than the lands on which they were located.

Disputes between the Creek and Seminole Nations soon arose over the jurisdiction of this area, and the Seminoles were much discouraged over the prospect of having to move again and reestablish their homes. As the United States Agent for the Seminoles stated in his report to the Commissioner of Indian Affairs, dated September 25, 1872 (1872 Rept. Comr. Ind. Off., p. 241):

> "It is to be hoped that the Seminoles will be protected in their just title to their present homes, and that the Government will urge upon the Creek authorities a speedy settlement of the disputed title of the Seminoles to the lands upon which the Government placed them, and which they have improved with more assiduity and care than their neighbors. Many of them are still in doubt whether their lands and improvements will be secured to them, and this uncertainty in this class of Indians is exceedingly discouraging and rests like an incubus upon their energies and labors.
>
> "The Seminoles do not feel, and, I think, very justly, that they are a party in the settlement of this matter, excepting as a protesting party against their removal from this to a new country. They say that they pur-

chased of the United States Government a certain amount of land, adjoining the Creek country on the west; that the Government showed them their boundaries, and located them, and told them this was to be their future home, and for them to go to work and improve it, and they have done so in good faith, and they are now happy and contented. And if their improvements have been made upon Creek soil, which is evidently the fact, the Government, and not they, is responsible, and they look to the Government to secure them in their rights and protect them in their present homes."

And as the Commissioner commented to the Secretary of the Interior in this same report, pp. 36-37, as follows:

"* * * A cause of discontent and just complaint on the part of this people is found in the fact that the Government, in providing them a new home, after the cession of their reservation under the treaty of 1866, misled them as to their boundary-line, so that many have settled beyond the line, upon territory still belonging to the Creeks, and have there established themselves in comfortable homes and upon lands which they have very much improved. The Seminoles so situated are troubled and discouraged, having no security as to their possession of the lands and improvements thereon, so occupied. As the mistake was not theirs, they look to the Government to adjust the matter with the Creeks, and to secure them in their rights and in the possession of their present homes. The Department has the matter under careful advisement, and will earnestly seek to avoid any unfortunate issue of the complication. So soon as the best method of saving at once the rights of the Creeks and the equities of the Seminoles shall be determined, Congress will be asked to provide the requisite authority for the adjustment of the question."

Accordingly Congress, by Act of March 3, 1873, c. 322, 17 Stat. 626, authorized negotiations with the Creek Nation for the cession of 175,000 acres of its domain, the respondent believing that such a purchase would cover all of the

Creek lands then occupied and improved by the Seminoles.

Further to remedy the situation, and to fulfill its promises to the Seminoles—to protect them in their improvements—the respondent, on February 14, 1881, purchased from the Creek Nation 175,000 acres of land immediately east of the Creek "dividing line", as run by Bardwell, and added same to the original Seminole 200,000-acre tract without cost to the Seminole Nation. By Act of August 5, 1882, c. 390, 22 Stat. 257, 265, the amount of $175,000 was duly paid the Creek Nation for these lands. (*Creek Nation v. United States*, 93 C. Cls. 561, 562-563; Senate Ex. Doc. No. 126, 51st Cong., pp. 2, 3, 6, 9; Sen. Ex. Doc. No. 75, 47th Congress, 1st Sess., p. 6; Finding 5, R. 7-8; Rept. Comr. Ind. Aff., 1872, pp. 36-37, 241; R. 17-19).

When the Act of August 5, 1882 was before Congress, and this Seminole matter was under consideration, Congress had before it two views concerning the liability of the Seminoles for the 175,000 acres purchased from the Creeks. Commissioner of Indian Affairs, H. Price, in his letter to the Secretary of the Interior, dated January 9, 1882, expressed the view that the Seminoles should pay for the Creek lands upon which they had been erroneously located, and in his draft of the proposed legislation to settle the matter, he included a provision that the Seminoles relinquish to the United States 175,000 acres on the west side of their 200,000-acre treaty tract in lieu of the 175,000 acres to be added to their domain (Sen. Ex. Doc. No. 75, 47 Cong., 1 Sess., pp. 2-3). The other view of the matter was advanced by Acting Commissioner of Indian Affairs, Thomas M. Nichol, in his letter to the Secretary of the Interior, dated February 18, 1881, submitting a draft of the proposed legislation to rectify the matter. Acting Commissioner Nichol viewed the matter as follows (Sen. Ex. Doc. No. 75, 47 Cong., 1 Sess., p. 7, Cong. Ser. 1989):

> "As shown in the foregoing, the homeless condition of the Seminoles, and their unwelcome occupation of lands belonging to another tribe, as well as the neces-

sity of settling them somewhere as soon as possible, in order to enable them to commence to support their families, led the Government to locate them on what, at the time, was supposed to be the land that would enure to them, when the 'dividing line' should be surveyed, but which, upon the correct survey of the line, was found to be included in the Creek reserve. That they were thus erroneously located, is under the circumstances, not to be wondered at, but certainly it was through no fault of the Seminoles, and the Government should therefore pay the Creeks for the lands sought to be purchased, and should also meet the expense of the survey thereof. The Seminoles certainly should not be required to do this, especially when it is considered that they received only fifteen cents an acre for the country relinquished by them in the treaty of 1866, while the United States paid the Creeks thirty cents per acre for the half of their domain ceded to the United States, and then charged the Seminoles fifty cents an acre for the part of the same land sold to them, and only after the lapse of nine years made up to them the difference in price."

Both views were before Congress at the time, and Congress rejected the view that the Seminoles be required to pay for this land, and adopted the view expressed by Acting Commissioner Nichol, for the Act of August 5, 1882 provides as follows:

"To pay the Creek Nation of Indians for one hundred and seventy-five thousand acres of land now occupied by Seminole Nation, the sum of one hundred and seventy-five thousand dollars, as per agreement, made in pursuance of the Act of March third, eighteen hundred and seventy-three, which agreement bears date February fourteenth, eighteen hundred and eighty-one, and is now on file in the Department of the Interior; said sum to be immediately available."

Thus no provision was made requiring the Seminole Nation to pay for this land, and it is clearly evident that Congress intended the above payment as reparation to the

Seminoles for the error made by the United States in locating them on the wrong land.

The eastern boundary of the 175,000-acre tract was surveyed in 1888 by respondent's officer, H. C. F. Hackbusch. Concerning said east boundary, said Hackbusch reported as follows (*Creek Nation* v. *United States*, 93 Ct. Cls. 561, 570-571):

> "This line (the east boundary of the Seminole), in accordance with special instructions, was run so far east of the Creek Dividing Line as to include an area of 175,000 acres. But the one hundred seventy-five thousand acres do not embrace all the lands now occupied by the Seminoles. Some valuable property remains east of the east boundary, such as the store and post office at We-wo-ka; the We-wo-ka mission; the store and post office at Arleka and several homesteads of the Indians. As near as I can estimate, not having a positive knowledge, it will take about twenty-five thousand acres more or less to include all the property of the Seminole Indians, which now remains east of the east boundary, as surveyed by me, under my contract of June 26, 1888."

Thus the respondent just partially corrected said errors. We have seen that the United States removed the Seminoles to what was believed to be their new national domain before the Creek "dividing line" was surveyed, and encouraged them to make improvements as rapidly as possible; then led them to believe that the Rankin line was the correct dividing line, and promised them that if it were not correct, the United States would protect them in their improvements; and that in reliance upon these promises the Seminoles in good faith continued to make improvements on these lands. When the correct "dividing line" was established, and it was determined that the United States had erroneously located the Seminoles on Creek lands, the Government made good its promise to the Seminoles in part only. We submit that under these circum-

stances said $175,000 was disbursed by respondent to correct its own errors, and to carry out its promises to the Seminoles, and therefore this item would not constitute an element of gratuity.

Furthermore, we believe that rather than being an element of gratuity this item is merely an element of reparation. The improvements which the Seminoles had made upon these lands were very valuable. In Sen. Ex. Doc. No. 126, 51st Cong., 1st Sess., p. 2, the Secretary of the Interior stated that the Seminoles had valuable improvements on this Creek land. On page 3 thereof the Commissioner of Indian Affairs stated that the Seminoles had "made for themselves homes and valuable improvements" on this land. On page 6 thereof the Seminole delegates state "The homes and improvements of the Seminoles are worth vastly more than the lands upon which they are situated will cost." On page 9 thereof Assistant Attorney General, Geo. H. Shields, stated that "nearly all of the extensive improvements made by the Seminoles since their settlement on the land, * * * and also the agency buildings," were on this Creek land. In Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 6, Acting Commissioner of Indian Affairs, Thos. M. Nichol, stated that since the fall of 1866 the Seminoles had "made for themselves homes and very valuable improvements" on these lands.

We submit that in the absence of proof to the contrary —and the respondent has the burden to prove affirmatively its offset claim—the record outlined above clearly shows that the improvements made by the Seminoles from the time of their location on these Creek lands (1866) to 1871, would far exceed the $1.00 per acre paid by the United States for these Creek lands.

Thus, in refusing recovery in this case the lower court mixes up lands of the two entirely separate and distinct Seminole tracts, and disregards the fact that the 175,000 acre tract was given to the Seminoles to make good the error of the United States in settling them on the wrong

land, and to make good its promise to protect the Seminoles in their improvements. Thus this transaction involved no element of gratuity but constituted an element of reparation in that had the Government moved the Seminoles off the Creek lands and paid them for their improvements, it would have cost the Government more to rectify its error than to buy the land and give it to the Seminoles.

The Lower Court Has No Jurisdiction to Offset Lands Against Lands.

The lower court has no jurisdiction to offset lands against lands, as it did in this case. The Act of August 12, 1935, c. 508, 49 Stat. 571, 596, permits "sums" only to be offset as gratuities. While the lower court's decision recognized this fact, yet it goes on to state as follows (R. 9):

> "* * * Therefore, if the plaintiff be entitled to recover for any deficit in the 200,000 acre tract, the defendant would be entitled to an offset of the value of the acreage given them gratuitously. This value is far in excess of the value of whatever deficit there may have been."

Here again the lower court refuses to recognize the fact that the 175,000 acre tract was an element of reparation, and that it was not an element of gratuity. Furthermore, it states that the value of the 175,000 acre tract "is far in excess of the value of whatever deficit there may have been." This conclusion is not supported by any finding of the value of the 10,351.82 acre deficit, as of the dates of the patents issued—the date of the taking by the United States.

Thus, without endeavoring to establish and find the values of the acreage involved in this suit as of the date of taking, the lower court summarily jumps to the conclusion that the 175,000 acre tract was of more value than the smaller acreage claimed, and without considering that the lands involved in the claim were not a part of said

175,000 acre tract, or that the date of taking was at a later date than the transaction with respect to the 175,000 acre tract.[4]

The United States Is Entitled to Credit Just Once for an Item of Offset. . .

By the use of this 175,000 acre tract as a gratuity offset against petitioner, the lower court has used this same item of offset twice: in this case, and in *Seminole Nation* v. *United States*, 93 C. Cls. 500. In said *Seminole* case the lower court allowed the United States a gratuity offset in the amount of $165,847.17 for said 175,000 acre tract. The right of the defendant to such an offset in that case is challenged by the petitioner in case No. 348 now pending before this Court. Notwithstanding this allowance, the lower court again uses the same item of offset in the case at bar, to defeat the claim of the petitioner for just compensation for the value of the 10,351.82 acres involved in this case. Thus we have an anomalous situation of the lower court's allowing the same item of offset twice, and in two different amounts and in two different ways. Clearly the lower court erred in again using this item as an offset in the case at bar.

The Lower Court Failed to Find the Material Facts.

Let us point out to the Court that the lower court failed to find the facts material to the issues involved in this case. For example, in Finding 4 the lower court stated (R. 7):

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[4] In his concurring opinion (R. 9) Judge Madden pointed out that "when the defendant settled the Seminoles on the wrong land, and they made their improvements there, there was an obligation on the defendant to repair its mistake." He thus recognized the fact that an element of reparation was present. However, without a finding by the lower court of the value of the element of reparation and the value of the element of gratuity involved in this 175,000-acre Seminole tract, the conclusion of the concurring opinion—that the element of gratuity more than offset the element of reparation—clearly would not be justified.

> "It is alleged that when the boundaries of this tract came to be fixed, the area included was 11,550.54 acres short of 200,000 acres. If it was in fact short this amount, or any other amount, the plaintiff has been dispossessed of said acreage and the same has been granted and is now held adversely by others."

We submit that this statement is not a proper finding as to whether or not the said 10,351.82 acres of Seminole land were excluded from the Seminole domain and included within the Pottawatomie Reservation. This is merely a statement of the pleading and clearly is not a proper finding of fact. In *United States* v. *Henry*, 17 Wall. 405, 408, this Court held that a statement of the Court of Claims that the mustering officer "alleged" that a company was below the minimum strength was not a proper finding of fact.

The Court of Claims was empowered to promulgate rules for its government and for the regulation of practice therein (U. S. Code, Title 28, Sec. 263).

Rule 75 of that court provided in part as follows:

> "(a) In any case where both parties request in writing at the time the case is submitted to the Court that the facts be specially found, the court will make and enter special findings of fact as part of its judgment.
>
> * * * * * * * * *
>
> "(c) The special findings required by the two preceding paragraphs shall be in the nature of a special verdict, and shall set forth the ultimate facts found from the evidence, but not the evidence from which they are found. (See act of February 13, 1925, 43 Stat. 936, 939; U. S. Code, Title 28, sec. 288.)"

Whether the Robbins survey was erroneous and, if so, how many acres of Seminole lands were included in the Pottawatomie reservation, were essential questions of fact in the case, and clearly the lower court failed to comply with its rule in neglecting definitely to determine these material facts.

The Act of May 22, 1939, c. 140, 53 Stat. 752, permits this Court to review the facts wherein "there is a failure to make any finding of fact on a material issue."

With the essential parts of the Kidder report before it we submit that this Court would be justified in making the following findings on the above material issues of fact:

1. That Nathaniel Robbins, under direction of the Commissioner of Indian Affairs, surveyed the north and west boundaries of the Seminole domain granted to the Seminole Nation by said Treaty of March 21, 1866, and his survey was approved by the Secretary of the Interior on February 5, 1872. This survey was grossly in error in that Robbins failed to begin his survey of the north boundary at the Creek "dividing line" established by Bardwell in 1871, but began at a point 1406 feet east of that line; that the Robbins meander courses of the North Canadian River, which forms the north boundary of the Seminole domain, are not correct as to their direction from true north; the Bardwell measurement of the length of the Creek "dividing line," which formed the east boundary of the Seminole 200,000-acre tract, is very much less than the distance given in the Bardwell field notes; and the actual length of the west boundary of said 200,000-acre tract, between the north and south Canadian Rivers, is 1905 feet *greater* than the Robbins field note record distance (R. 11-14). The result of these known discrepancies was to indicate a greater calculated area for the 200,000-acre tract than was actually included by Robbins within the boundaries of this tract (R. 11-14).

2. That the east, north and south boundaries (the North and South Canadian Rivers, and there being no appreciable change in the banks since 1895, or since 1871, R. 12-13)—all being fixed boundaries—the west line as surveyed by Robbins was established too far east, and a strip of 10,351.82 acres of the Seminole National domain was included in the Pottawatomie Reservation located immediately west

of the Seminole domain, and the 200,000-acre tract included but 189,648.18 acres (R. 16).

We submit that the lower court should have found the facts with respect to the following material issues of fact:

1. Whether petitioner received fee simple title, *in praesenti*, to the 200,000 acres described in the Treaty of March 21, 1866, 14 Stat. 755.

2. That the Robbins survey of the west boundary of the Seminole national domain was grossly in error.

3. The amount of acreage actually excluded from petitioner's 200,000 acre tract by the erroneous Robbins survey of the west boundary line in 1871.

4. The time when the errors of the Robbins survey of the 200,000 acre tract first became apparent to the officials of the respondent.

5. The time when the Seminole Nation first demanded the lands to which they were entitled, and requested respondent to correct the error.

6. The amount of acreage taken from petitioner and patented to white settlers and individual Pottawatomie Indians.

7. The amount, if any, of the element of gratuity present in the 175,000 acre tract claimed by the respondent as an offset.

8. The amount of the element of reparation present in the 175,000 acre tract.

9. The value of petitioner's 10,351.82 acres at the time of the taking.

From a study of the case of *United States* v. *Creek Nation*, 295 U. S. 103, it will readily be seen that this Court considered these facts material to the proper determination of that case. A mere glance at the lower court's Findings in this case (R. 6-8) shows the complete absence of the finding of these necessary facts.

Conclusion.

From the facts herein set forth, which are supported by the record before this Court, it is evident that 10,351.82 acres granted in fee simple to the Seminole Nation by the Treaty of March 21, 1866, because of an erroneous survey, were excluded from the Seminole domain and included in the Pottawatomie Reservation, and were thereafter erroneously patented to Pottawatomie Indians and white settlers; that after a knowledge of the facts the United States, the guardian of petitioner, took no action to place the Seminole Nation in possession of its lands.

We submit that under these circumstances the lower court should have applied the rule laid down by this Court in *United States* v. *Creek Nation*, 295 U. S. 103, and should have awarded the Seminole Nation just compensation for its lands thus taken.

Furthermore, we submit that the lower court improperly injected into this suit the issue with respect to the $175,000-acre Seminole tract, and that in any event this item is not a proper offset against the Seminole Nation.

For the reasons above set forth, we respectfully request that this Court reverse the decision of the lower court and direct it to proceed further in such manner as this Court decides will be just and proper with respect to the rights of petitioner in this case.

Respectfully submitted,

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